United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1041

To be argued by
JERRY L. SIEGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1041

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH ANTHONY MARTINEZ-CARCANO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JERRY L. SIEGEL,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1041

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH ANTHONY MARTINEZ-CARCANO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Anthony Martinez-Carcano ("Martinez") appeals from a judgment of conviction entered on January 5, 1977, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 76 Cr. 965 was filed in three counts on October 15, 1976. Count One charged Martinez and five others, two of whom were federal correctional officers at the Metropolitan Correction Center ("MCC"), with conspiring to assist in the escape of an inmate from that institution, and to solicit and accept a bribe for so doing, in violation of Title 18, United States Code, Section 371. Count Two charged the two correctional officers with accepting and agreeing to accept a bribe of five thousand

dollars ($5,000) in return for their assistance in the escape of an inmate from the MCC, and charged Martinez and his three other co-defendants with aiding and abetting same, all in violation of Title 18, United States Code, Sections 201(c) and 2. Count Three charged Martinez and the five co-defendants with assisting in the escape from custody of the inmate, Yolanda Sarmiento, who had been arrested on a charge of felony, in violation of Title 18, United States Code, Sections 752(a) and 2.

The five co-defendants each pleaded guilty to various counts of the indictment prior to trial, which commenced on December 16, 1976.* On December 22, 1976, the jury returned a verdict of guilty on Counts One and Two of the indictment and a verdict of not guilty on Count Three.

On January 5, 1977, Martinez was sentenced by Judge Gagliardi to terms of imprisonment of three years on Count One and six years on Count Two, the sentences to

---

* On November 11, 1976, defendant George D. Philip pleaded guilty to Counts One and Three of the indictment. On November 15, 1976, defendants Yasin A. Wahid, a/k/a "Coco", and Zulma Rosa Amy, a/k/a "Vickie", each entered pleas of guilty to Counts One and Three of the indictment, while defendants Carmen Cirilo, a/k/a "Mina" and Brenda Virginia Cooke each pleaded guilty to Count One of the indictment. On January 5, 1977, Judge Gagliardi sentenced Wahid and Philip, the two federal correctional officers, each to a two-year term of imprisonment and a fine of $2,000 on Count One and a six-month term of imprisonment and three years' probation on Count Three, the sentences to run concurrently. Defendant Amy was sentenced to six-month terms of imprisonment on both Counts One and Three, to run concurrently, the execution of which was suspended, the defendant being placed on probation for two years and fined $1000, payable jointly by her and her husband, the defendant Martinez. Defendants Cirilo and Cooke were each given six-month terms of imprisonment on Count One, the execution of which was suspended, and they were placed on probation for two years.

run concurrently to one another but consecutive to the three-year sentence Martinez was then serving upon his conviction for violation of the federal narcotics laws. He was also fined one thousand dollars, payable jointly by him and his wife, who was a co-defendant.

Statement of Facts

A. The Government's Case

The proof at trial showed that during September and October of 1976, the defendant Martinez, who was then an inmate at the MCC, initiated and orchestrated a plan to assist a major international narcotics figure, Yolanda Sarmiento, in escaping from federal custody at the MCC, in exchange for $25,000. Martinez enlisted the aid of five other people in this effort, including two federal correctional officers and his own wife. The details of the planned escape, developed by Martinez and the correctional officers, were communicated in numerous telephone calls and in four meetings held at a Manhattan hotel between September 21 and October 4, 1976. Unbeknownst to the defendants, Sarmiento had informed federal authorities of the proposed escape and one of the persons with whom the defendants met and spoke was an undercover New York City Detective. On October 4, 1976, using a wig, clothing, and a false photo identification card, all procured at the defendant's direction, Sarmiento walked out of the MCC.

1. The Scheme Begins

In May of 1976, Yolanda Sarmiento was extradited from Argentina and returned to the United States to face several outstanding indictments charging her with

violations of the federal narcotics laws.* (Tr. 50-51, 120).** In the MCC at the time was the defendant Martinez who was serving a three-year term of imprisonment following his conviction in 1975 for violation of the federal narcotics laws. (Tr. 395-96). On the day after Sarmiento's arrival at the MCC, Martinez introduced himself to her by bringing her a message from a former narcotics associate of hers who was also in custody at the MCC and told her that "if you need anything, do not hesitate to let me know." (Tr. 408-9, 55-56, 142, 471). Thereafter, Martinez and Sarmiento saw or spoke to one another daily, usually meeting on the roof of the institution during the recreation period. (Tr. 56-57, 411). Among other things, they discussed her torture by Argen-

---

* Sarmiento was named as a defendant in four federal narcotics indictments, three in the Eastern District of New York (Indictments 72 Cr. 1260, 74 Cr. 492 and 74 Cr. 493) and one in the Southern District of New York (Indictment 74 Cr. 472) (Tr. 122, 181-82), as well as a state indictment charging her with bail jumping, arising from her arrest in 1970. (Tr. 118). A fifth indictment, 74 Cr. 11, had been superceded by 74 Cr. 493. (Tr. 186-87). Shortly after her arrival in the United States, an agreement was entered into between the Government and Sarmiento under which she would plead guilty to the one count contained in Indictment 74 Cr. 492 and the remaining federal charges against her would be dismissed. (Tr. 51, 180-203). Sarmiento pleaded guilty on November 4, 1976 (T. 183), and at the time of trial faced a possible sentence of five to twenty years' imprisonment upon her conviction, aside from any sentence she might receive on the state charges. (Tr. 123-28, 180-203).

Outside the presence of the jury, the Government explained to the court that Indictment 74 Cr. 492 had superseded Indictment 72 Cr. 1260 and that Indictments 74 Cr. 492 and 74 Cr. 472 involved the same acts, and hence could not both have been prosecuted in any event. The court nonetheless allowed cross-examination on all the indictments. (Tr. 81-90).

** References to the trial transcript are abbreviated herein as "Tr."; to the Government's trial exhibits as "GX"; to Martinez' brief as "Br."; and to Martinez' appendix as "App."

tinian authorities prior to her extradition and the kidnapping and murder of her son. (Tr. 172-76).

In late August or early September of 1976, Martinez for the first time told Sarmiento that for a certain amount of money he could arrange for her escape. Sarmiento did not take this initial approach seriously, but when Martinez again raised the subject, she inquired as to the price and was told it would cost her $50,000. (Tr. 56-59). Telling Martinez that she would consider the proposal, Sarmiento instead informed her attorney, Howard Jacobs, of the escape offer and he in turn informed the United States Attorney's Office. Thereafter, a meeting was held between Sarmiento, her attorney, and various federal officials, following which Sarmiento then returned to the MCC and told Martinez that $50,000 was too much money. The following day, Martinez indicated that he and his associates would agree to do it for $25,000, provided that they were given $5,000 cash in advance. (Tr. 59-61, 485-87). Sarmiento agreed and told him she had to contact her brother in Argentina in order to get the money. (Tr. 61, 487).

Two further meetings were held with Sarmiento, her attorney and federal officials, as a result of which it was arranged that Detective Rafael Rodriguez of the New York City Police Department and another individual would pose as Sarmiento's brother from Argentina and his New York associate, who were bringing the funds to pay for the escape. (Tr. 61, 204, 497).

2. Martinez Assembles His Co-Conspirators

Meanwhile, Martinez had learned that one of the correctional officers, George Philip, had just returned to duty after a period of suspension and was in serious financial difficulty. Martinez approached Philip and asked him

whether he would be willing to help someone escape and Philip indicated he was interested.* (Tr. 481-84, 421). After fixing the terms and price of the escape, Martinez and Philip awaited the arrival of Sarmiento's brother from Argentina with the $5,000 downpayment. When he failed to appear, Martinez told Sarmiento that if the money did not arrive shortly, the whole deal would be off. (Tr. 487). Shortly thereafter, an open house was held at the MCC, at which Sarmiento informed Martinez that her brother would arrive from Argentina that day or the following day. (Tr. 489). On that same occasion, Martinez introduced Sarmiento to his common-law wife, Zulma Amy, a/k/a "Vickie", and when Martinez and his wife were alone, told his wife of the planned escape. (Tr. 490-91).

A second correctional officer, Yasin Wahid, a/k/a "Coco", was then brought into the conspiracy** and the three began to plan the mechanics of the escape. (Tr.

---

* It was later revealed that this officer frequently was given money by Martinez in the past. Although Philip actively participated in the initial stages of the escape, he became only tangentially involved later on and Martinez agreed to pay him only to insure his silence. (GX 21, 21A).

** While Martinez insisted at trial that it was Philip and not he who had decided to include Wahid in the planned escape (Tr. 422, 491-92, 527-31), Wahid explained to Rodriguez in a recorded conversation during their meeting on September 27, 1976 at the Ramada Inn that:

> Wahid: . . . you see Martinez know me he trust me.
> Rodriguez: ah ha.
> Wahid: he dont pick anybody he trust me he know me. (He watch my moves) he know what I do in the institution.
> Rodriguez: uh hmm.
> Wahid: I do many things in the place, you know, many things you know, I bring in liquor to the fellows, I bring in drugs to the fellows, you know I make everybody happy, you know. (GX 13, 13A).

493-97). When it was learned that Sarmiento's brother spoke no English, and hence that an interpreter would be needed, Martinez called his wife and instructed her to accompany Philip to the meeting at which the $5,000 was to be paid and to act as an interpreter. When she resisted his request, Martinez told her that unless she complied she should not come to see him again. (Tr. 538-39).

3. The First Meeting: Officer Philip and Martinez' Wife Collect the Initial $5,000

On Tuesday, September 21, 1976, Detective Rodriguez and his associate, Ricardo Lopez, posing as Sarmiento's brother from Argentina, took up residence in Room 719 of the Ramada Inn on 48th Street and Eighth Avenue in Manhattan. The room was wired for sound by agents of the Drug Enforcement Administration who were located in the room next door, and all four of the subsequent meetings with various of the co-conspirators were fully recorded. (Tr. 204-5, 207).*

Sarmiento then informed Martinez that her brother had arrived with the necessary money from Argentina and gave him the address. Martinez immediately arranged for his wife and Philip to meet with Sarmiento's alleged brother at the Ramada Inn that evening to collect

---

* Both the tapes and the transcriptions of the tapes for each of these meetings were introduced into evidence at trial. Furthermore, all telephone calls between the hotel room and the various co-conspirators were recorded and introduced into evidence at trial, including nine calls from defendant Martinez to the hotel. All calls from Sarmiento to the hotel were also recorded but the defendant did not offer any of them into evidence at trial.

the $5,000 advance. (Tr. 497-99). After first calling to indicate she was coming (Tr. 206; GX 6, 6A), Amy and Philip arrived at the Ramada Inn and met Rodriguez and Lopez. Upon request, Philip produced his Department of Justice identification and shield in order to prove his identity. (Tr. 209; GX 7).

With Zulma Amy acting as an interpreter, Rodriguez indicated that he was prepared to give Philip the agreed upon $5,000 advance money but that he wanted to know some of the details of the planned escape. Philip said that Sarmiento would be provided with a wig, clothing, and a forged MCC photo identification card. These items would be left in a restroom in the visting area where Sarmiento would change. Then, using a hand stamp which would identify her as a visitor, she would escape from the institution. (Tr. 210-11; GX 9, 9A). Philip indicated that Sarmiento would then be taken to an undetermined location and upon payment of the remaining $20,000 she would be turned over to Rodriguez. (Tr. 211-12, 425-27).

Rodriguez then counted out $5,000 in one hundred dollar bills and handed the money to Philip who kept $2,000 and handed the remainder to Zulma Amy and they departed. (Tr. 211-14; GX 9, 9A). At Martinez' instructions, Wahid later went to his home and picked up $2,000 from his wife.* (Tr. 223, 502-3).

---

* The ultimate distribution of the fruits of this crime were the subject of some dispute at trial. Martinez claimed in his direct testimony that he was not to receive any money at all for his efforts. (Tr. 429-30). On cross-examination, however, this facode of magnanimity was shattered by Martinez' grudging admission that he was to receive an eighth of a kilogram of cocaine for his efforts, (Tr. 533) and that he and his wife had kept $1,000 of the advance payment. (Tr. 503). This fact substantially undercut defendant's claim that he was motivated to participate in the escape solely as a result of his sympathy for Sarmiento.

4. The Second Meeting: Officer Wahid Delivers Instructions From Martinez

Martinez prepared a list of items which would be needed to effect the escape, and instructed officer Wahid to deliver it to the Ramada Inn. (Tr. 220, 500-02; GX 12, 12A).

On Monday, September 27, 1976, Martinez' wife told Lopez that the correctional officers would visit them that evening. (Tr. 219-20; GX 12, 12A). Officer Wahid arrived alone at the Ramada Inn a little after 10:30 P.M. and produced a handwritten note from Martinez, explaining:

> Wahid: Martinez said you got to get this.
>
> Rodriguez: Ah ha.
>
> Wahid: You got to get this: camera, shoe size 7, the wig, ah red or blonde, you know pocketbook, a used pocketbook, and size 22½ pantsuit. (GX 13, 13A).

Wahid then offered to provide a wig and pocketbook while Rodriguez promised to secure the other items on the list. Wahid went on to explain that a polaroid camera was needed in order to take color pictures of Sarmiento for an identification card which Martinez was to prepare. (Tr. 222-23).

Wahid also told Rodriguez that there had been a change in plans because he had been shifted from his assignment in the visiting room, and that Sarmiento, using the identification card, would walk unescorted from the institution to a waiting car driven by a woman friend of his. (Tr. 224; GX 13, 13A).

5. The Third Meeting: Officer Wahid Collects The Disguise and Photographs Are Taken

The following day, Tuesday, September 28, 1976, Wahid called to see whether Rodriguez had secured the items as requested by Martinez. (Tr. 231; GX 14, 14A). Rodriguez indicated that he had and Wahid arrived at the Ramada Inn at 10:30 that evening. After Wahid produced his Department of Justice identification and shield, (Tr. 232; GX 15), Rodriguez gave him a beige pants suit and blouse, (GX 5A, B and C), a pair of women's shoes, and a polaroid camera, (GX 16), as Martinez had instructed.

Then, in an effort to determine the distance at which the photographs of Sarmiento should be taken for use on the forged identification card, Rodriguez, Lopez and Wahid took a number of photographs of one another. (Tr. 232; GX 17A and B). When Wahid suggested that he show one of the photographs of Rodriguez to "Brenda", the woman who would drive Sarmiento from the MCC to the hotel, so that she would recognize him, Rodriguez suggested that they instead exchange photographs upon meeting as means of identifying themselves. Rodriguez offered to rent a car for use in the escape and Wahid agreed, since the woman driver's vehicle had New Jersey license plates which were registered under her proper name, and hence could be traced to her. (Tr. 233-34; GX 18, 18A).

Wahid then explained that Martinez had planned the escape for Friday, October 1, 1976, between one and three o'clock in the afternoon (Tr. 233), and left shortly thereafter.

The following day, Wahid brought the camera and clothing into the MCC, and gave them to Martinez. During the evening, Martinez told Sarmiento to go to the

library on the second floor during one of the classes. Martinez met her there and after instructing her to put on the clothing and the wig, (GX 4), he took three or four photographs of her which were to be used on the forged MCC identification cards. (Tr. 65-67, 427, 510-13).

6. The Fourth Meeting: Martinez Finalizes The Escape Plans

On Thursday, September 30, 1976, the defendant Martinez himself called the Ramada Inn directly from the MCC and spoke with Lopez, telling him that Wahid would visit them at 10:30 that evening. (Tr. 241; GX 19, 19B). Wahid did in fact arrive shortly after 10:30 P.M., and told them that he had prepared the identification card for Sarmiento.* Wahid then gave them a letter from Martinez (GX 21, 21A), indicating the approximate time at which Sarmiento would go through the various steps prior to her escape. The note also indicated, however, that the escape might be postponed until Monday, October 4, which would be Yom Kippur, since, as the noted stated: "Monday is better because it is a Jewish holiday, less workers, less vigilence." (GX 20; Tr. 242-3). As Wahid explained, Martinez would call the hotel at 9:00 A.M. the next day, October 1, 1976, and indicate whether the escape was to proceed or not. (Tr. 246-47; GX 21, 21A).

While Wahid was describing the car which Brenda Cooke would be driving, Rodriguez received a phone call

---

* Using a card which Martinez had stolen (Tr. 515, 527), Wahid first prepared a white MCC identification card identifying Sarmiento as a bi-lingual teacher. (GX 1). It was later decided that since Sarmiento spoke no English, she should be identified as a Spanish teacher, and Wahid prepared a second card (Tr. 245; GX 2), forging the Warden's signature thereon. (Tr. 244; GX 21, 21A).

from Martinez himself and discussed with him the plans for the following day. (Tr. 245, GX 21, 21A). After reviewing the [illegible] in which the remaining $20,000 would be transferred, Wahid left.

7. October 1, 1976—The Escape Is Postponed

On Friday morning, October 1, 1976, Martinez instructed Sarmiento to sign herself out to visit the doctor on the second floor and then met her when she arrived there. He told her to go into a restroom and try on the clothing hidden in a bag there, which she did. (Tr. 67-68, 427). At 10:00 A.M. Martinez called the hotel and explained that he was downstairs with Sarmiento, and that although security at the institution was somewhat tighter because of an incident at the MCC the previous evening, the escape would go ahead as planned at 11:30 A.M. (Tr. 249-50, 427-28, 509-10; GX 22, 22C).

Martinez called back at 10:35 A.M., however, to say that "it looked very ugly" and that the escape would be postponed until Monday, October 4, 1976. (Tr. 69, 250, 510; GX 22, 22E). Wahid then called and after learning of the postponement discussed the manner in which Sarmiento would be picked up at the MCC. (Tr. 252; GX 22, 22F).

On Saturday, October 2, 1976, Martinez met with Sarmiento, Philip and Wahid on the roof of the MCC to go over the plans for the escape. (Tr. 72-73).

On Sunday night, October 3, 1976, Martinez called to confirm that the escape would go ahead as planned the following day. (Tr. 255-56; GX 24, 24A). Wahid then called and it was decided that Rodriguez would drive with Brenda Cooke to pick up Sarmiento at the MCC

since Sarmiento and Brenda might not recognize one another. Wahid told Martinez for the first time that his wife, "Mina", the defendant Carmen Cirilo, would also accompany them, and that the package containing the $20,000 should be given to her and not to Brenda Cooke. (Tr. 257; GX 24, 24B).

8. October 4, 1976—The Escape

On Monday morning, October 4, 1976, Martinez met Sarmiento on the second floor of the MCC and handed her a detailed diagram which he had prepared depicting the ground floor of the MCC and the route which Sarmiento was to follow in exiting from the institution. (GX 3). She then returned to her floor to await further instructions from Martinez. (Tr. 74-75).

At 11:20 A.M., Martinez called Rodriguez at the Ramada Inn and told him the escape was to occur at 1:30 P.M. It was also agreed that Rodriguez would call Martinez' wife after the escape was completed and leave a telephone number where he could be reached in order to arrange for the subsequent delivery of an eighth of a kilogram of cocaine which Martinez had been promised by Sarmiento. (Tr. 532-35; GX 25, 25B).

At about 12:30 P.M., Carmen Cirilo and Brenda Cooke arrived and entered Rodriguez's rented car, where they immediately exchanged photographs as planned (Tr. 258-60; GX 26, 27), and then drove downtown to the MCC. When she failed to appear by 1:50 P.M., Rodriguez called the Ramada Inn and learned that Martinez had called and indicated she would come out at about 2:30 P.M. (Tr. 260; GX 28, 28A, 25, 25C). Rodriguez Cooke and Cirilo then returned to the MCC at 2:15 P.M.

Meanwhile, inside the MCC, Sarmiento again went down to the doctor's office and was directed by Martinez

to a small room where another identification card and the clothing were secreted. Sarmiento put on the clothing and the wig and was then given some books by Martinez to make her look like a teacher, as her identification card indicated. Martinez wished her luck and she walked into the lobby, showing her card to the guard in the control room. She went through the lobby, passing Wahid who nodded to her that everything was all right, and went out of the MCC and into the street. (Tr. 75-77, 428).

When Sarmiento appeared on the street, Carmen Cirilo spotted her and began motioning to her to cross the street, and Sarmiento entered the vehicle. They drove away and several blocks later, the car was halted by federal agents and all the occupants were placed under arrest. (Tr. 77, 260-61).

B. The Defendant's Case

Martinez sought to greatly downplay his importance in the initiation, planning and execution of the escape, although he could not deny participation therein. Instead, Martinez claimed to have been entrapped by Sarmiento, who lured him into helping her escape in order to help herself in her pending criminal case, after gaining his sympathy by telling him of her alleged mistreatment at the hands of Argentinian and American authorities. While he initially sought to portray himself as having been motivated solely by his concern for Sarmiento, with no thought of sharing in the $25,000 proceeds of the crime, he grudgingly acknowledged on cross-examination that he was to have received narcotics for his efforts.

Martinez called five witnesses employed by or associated with the MCC, who testified that as a minimum custody inmate (Tr. 292), he initiated a wide variety

of programs at the MCC for the benefit of the inmates. (Tr. 296-302, 547-65). Four of these witnesses testified that Martinez' reputation for truthfulness and veracity was good. (Tr. 296-97, 301-2, 549, 555-56, 563-65). Called as a defense witness, Sarmiento testified that while the defendant had acted as an interpreter for her on occasion, she was not aware of his activities at the MCC generally. (Tr. 378-79).

Armando Cardona, who was serving a sentence of 25 years to life upon his state conviction for murder, testified that while he was at the MCC, Sarmiento had approached him on several occasions and asked him to help the two of them in escaping. (Tr. 333-34). On cross-examination, Cardona acknowledged that he hadn't told any of the authorities of Sarmiento's escape inquiries. (Tr. 342).

The defendant then took the stand and testified about his family background (Tr. 384-90) and his employment history.* (Tr. 388-90). He described how he became involved in the distribution of narcotics and his arrests and convictions therefor in Puerto Rico in 1973 and in New York City in 1975. (Tr. 390-95). On cross-examination, Martinez, who was obviously no stranger to the criminal justice system, claimed that he had been entrapped in the sale of narcotics in Puerto Rico as in the instant case (Tr. 446), and admitted that he had jumped bail in the first case just after a jury had been selected. (Tr. 448). Following his arrest in New York, Martinez pleaded guilty to various counts of both the Puerto Rican and New York federal narcotics indictments

---

* Defendant not only attended both high school and three and one half years of college (Tr. 441), but at one time worked as a head designer for the Grumman Aircraft Company, where he received government security clearance and worked on the Polaris missile. (Tr. 387-88).

and was sentenced to three years' imprisonment, which he began serving in June of 1975. (Tr. 393-96, 459). He was involved in and initiated many programs while at the MCC which he described in detail. (Tr. 398-408, 460-71).

With respect to Sarmiento, Martinez acknowledged having met her late in May of 1976 when he delivered a message to her from another inmate who was known by him to be a former narcotics associate of hers. (Tr. 408, 471-72). At the time, Sarmiento was bruised and in pain and Martinez, knowing of Sarmiento's stature as a major international narcotics trafficker, spontaneously began to look after her and to cultivate a relationship with her. (Tr. 409, 472-73). Later they began to meet on the roof of the institution and would speak for at least one or two hours every day. (Tr. 414). Martinez testified that after they got to know one another better, she told him how she was kidnapped, beaten and raped by the Argentinian police, (Tr. 412), how her son was kidnapped and killed there, (Tr. 413), and how her husband had escaped from federal custody in the United States. (Tr. 413).

Sarmiento told Martinez that she was facing the rest of her life in jail (Tr. 415-16, 481), and he developed a "real attachment" for Sarmiento and "befriended her completely." (Tr. 476-77). Martinez claimed that in late June, Sarmiento told him that "if there was any way she could escape, she would pay anything," (Tr. 478-79), a statement which Martinez admittedly did not take seriously in view of the frequency with which such remarks were voiced by other inmates. (Tr. 417, 479). Later, after he happened to mention that one of the guards was in financial difficulty, Martinez, allegedly at Sarmiento's request, approached Philip and inquired as to his willingness to assist in helping Sarmiento escape. (Tr. 482).

Martinez sought to portray his role thereafter as primarily one of an intermediary between Sarmiento and Philip (Tr. 483-87, 422), insisting that it was Philip and not he who enlisted Wahid's participation in the conspiracy, despite Wahid's recorded statements to the contrary. (Tr. 528-31, 422-23, 492-93; GX 13, 13A). He did, however, acknowledge forcing his wife to participate in the crime despite her initial reluctance (Tr. 490-91), telling her to either do it or forget him. (Tr. 539).

With respect to the escape itself, Martinez acknowledged directing the conspiracy from the MCC, communicating his plans and requirements to Rodriguez personally over the telephone as well as through his co-conspirators Philip and Wahid. Martinez admitted that he had stolen the model identification card (Tr. 515, 527), taken the photographs of Sarmiento used thereupon (Tr. 511-13), prepared the route map for the escape (Tr. 508), and made the decisions as to the timing of the escape, but attempted to demonstrate the benevolent motivations for his actions by claiming he was to have received none of the $25,000 proceeds of the crime. (Tr. 418-19, 424-30, 481). Martinez was finally forced to admit on cross-examination that aside from sharing in the proceeds of the $5,000 downpayment (Tr. 507-8), he was to have received a quantity of narcotics from Sarmiento for his efforts. (Tr. 531-37).*

---

* Upon this appeal, Martinez conveniently fails to mention this critical fact, and in highly misleading fashion, states only that "appellant was promised no money for his assistance" (Br. 14), "nor was any convincing motive offered for his help in this escape plan." (Br. 43).

ARGUMENT

POINT I

The District Court's Instruction to the Jury on Entrapment Was Entirely Correct.

Defendant claims the District Court erred in its charge to the jury on entrapment in two respects. First, it is claimed that the court "misdefined the nature of Government inducement," so as to make it "indistinguishable from the entire defense of entrapment itself." Second, it is claimed that in light of this misdefinition, the court's instruction that the defendant had the burden of proof on the issue of inducement, "in effect, informed the jurors that it was appellant's burden to prove entrapment by a preponderance of the evidence." (Br. 24). Aside from the fact that Martinez failed, either before or after the court's charge, to raise all but one of the objections which he now raises on appeal, a proper reading of the record in this case and the applicable law in this Circuit reveal his claims to be groundless.

In order to fully comprehend the care with which the court charged the jury on the issue of entrapment, a brief review of the events both preceding and following the charge is necessary. Upon learning that defense counsel intended to, but had not yet submitted an entrapment charge, the court indicated its inclination to use the charge approved by this Court in *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), but stated its willingness to consider and adopt defendant's requests if proper. (Tr. 277-80).

Defendant did ultimately submit a requested entrapment charge, (App. D) which, far from being "entirely proper" as he now suggests, (Br. 31), was defective in

at least three critical respects: (1) it totally failed to inform the jury that the defendant was required to offer *any* evidence of inducement in order to raise the entrapment defense; (2) it failed to recognize or to define in any way the element of inducement, implying that if the defendant were not predisposed to commit the offense, he was necessarily induced, and therefore entrapped; and (3) it failed to specifically indicate what the Government's burden of proof was or when it attached. Under this Court's decision in *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), the submission of this charge, standing alone, precludes defendant's complaints that the court declined to charge as requested, for as Judge Friendly held:

> "Although lawyers never seem to learn the lesson, it is elementary that to put a trial court in error for declining to grant a requested charge, the proffered instructions must be accurate in every respect." 524 F.2d at 1084.

When both sides had rested, the court indicated its intention to use the language of *Rosner* in charging the jury on entrapment, and invited counsel to examine a copy of that charge at the bench at that time. (Tr. 577-78). Defense counsel voiced no objection to the court's proposed charge, but proceeded to deliver his own version of the law of entrapment to the jury in the course of his summation, seriously misstating the law of this Circuit in so doing. Among other things, defendant argued to the jury that:

> "[I]f you have a reasonable doubt that my client initiated this crime, you must acquit him." (Tr. 593).

The court sustained the Government's objection to this comment, noting that it did not state the totality of the

law, but defense counsel closed his summation by again telling the jurors, *inter alia*, that:

> "[Y]ou will examine the evidence and determine if there is a reasonable doubt as to who initiated this crime.
>
> If you determine that in defendant's favor, you will acquit him and save his life." (Tr. 609).

Following defense counsel's mischaracterization of the law of entrapment, the court made the actual text its proposed charge available to counsel, specifically requesting that they examine it and "formulate any ideas" or "other suggestions as to what might be incorporated therein" prior to its being given. (Tr. 618). After the luncheon recess, the court sought counsel's suggestions:

> The Court: Gentlemen, you have had the opportunity to review my charge. Mr. Gallina, do you have any comment, not that you don't reserve your rights after I charge to take exception or make additional requests.
>
> Mr. Gallina: No, your Honor. I asked that the charge be submitted in the manner in which I had requested.
>
> The Court: I have incorporated substantially what you have requested in here in the appropriate parts. (Tr. 620).

Thus, defense counsel failed to register any specific objection to the court's proposed charge on entrapment and merely stated his preference for his own request to a charge which was erroneous in any event. The court then proceeded to charge the jury.*

---

* The court's charge may be found at Tr. 624-70, while that portion of the charge dealing with entrapment may be found at Tr. 645-49.

Despite defense counsel's failure to offer any suggested changes before the charge was delivered, he presented a long list of exceptions following the charge. (Tr. 671-78). Nevertheless, defendant's only specific objection to the entrapment charge was to "your Honor's statement they are not to consider between the defendant and Mrs. Sarmiento who spoke to whom first." (Tr. 672).* Beyond a general statement that the whole charge "centered itself around the defendant's predisposition," (Tr. 673) in the course of that specific exception, defendant made no objection to any other part of the court's entrapment charge.

After retiring to deliberate for twenty-five minutes, the jury asked to have the court's definition of entrapment sent into it. (Tr. 682). The court then reinstructed the jury on entrapment, (Tr. 682-85), defendant voicing no objection prior or subsequent thereto.

Defendant now raises for the first time on this appeal claimed errors in the court's entrapment charge which were never brought to the attention of the District Court for its consideration, despite the many efforts of the district judge to insure before its delivery that the charge would be satisfactory to the parties. In particular, the district judge was never alerted to the claims of error now made with respect to (1) the definition of "inducement", (2) the burden of proof assigned the defendant as to inducement, (3) the definition of the preponderance standard of proof, (4) the alleged failure to distinguish the elements of inducement and predisposition.

Rule 30 of the Federal Rules of Criminal Procedure, however, is very explicit in its provision that:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its ver-

> dict, stating distinctly the matter to which he objects and the grounds of his objection."

Having totally failed to comply with the requirements of Rule 30 by making specific objections to the charge before the District Court, defendant's present claims are not reviewable except for plain error. Fed. R. Crim. P. 30, 52 (b); *United States* v. *Araujo*, 539 F.2d 287, 291 (2d Cir. 1976); *United States* v. *Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976); *United States* v. *Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3331 (Nov. 2, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States* v. *Rivera*, 513 F.2d 519, 526 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States* v. *Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974); *United States* v. *Pinto*, 503 F.2d 713, 723 (2d Cir. 1974); *United States* v. *Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Leach*, 427 F.2d 1107, 1113 & n.6 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970).

In any event, defendant's arguments fail to reveal any error, much less plain error, in the charge. First, defendant attacks the court's reference to a "ready and willing" or "an otherwise innocent person" in the course of defining the term "inducement," arguing that this rendered "inducement" indistinguishable from the entire defense of entrapment. He further contends that when combined with the court's charge that the defendant had the burden of proof on the issue of inducement, the result was to place the burden of proving entrapment on the defendant.

In assigning error to the court's definition of inducement, however, defendant has completely overlooked this Court's decision in *United States* v. *Rosner*, 485 F.2d 1213, 1221-22 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), the very case upon which the trial court ex-

plicitly relied in defining the term. In *Rosner*, this Court quoted in full in footnotes 11 and 12, respectively, the definitions of the terms "inducement" and "predisposition" as given by Judge Bauman in his charge to the jury. Commenting upon those definitions, Judge Gurfein, writing for the Court, stated:

> "In this case, the court gave the jury appropriate instructions, both on inducement [11] and on predisposition.[12]"
>
> 485 F.2d at 1222.

In the instant case, the District Judge repeatedly stated his intention to give the entrapment charge approved by this Court in *Rosner*,* (Tr. 279, 577) and, as the record demonstrates, the court then in fact did so in precisely the same language approved of in *Rosner*,* both in its initial charge and in its re-instruction, without objection from defense counsel.

---

* Failing to offer reason for overruling this Court's decision in *Rosner*, or indeed any authority suggesting it to be other than the law in this circuit, defendant appears to suggest the judge erred in failing to indicate precisely when he was defining inducement as opposed to predisposition, and thereby confused the jury. An examinaiton of the court's initial charge reveals the baselessness of this claim, and again a comparison with the charge in *Rosner* is instructive.

Even assuming *arguendo*, however, that the court's initial charge was not altogether clear in this respect, the court's reinstruction on the law of entrapment made it abundantly clear which term it was defining, by prefacing its definition of inducement with the introduction "As to the meaning of inducement," (Tr. 684), and by prefacing its definition of predisposition with the observation that "I have used the word 'predisposition.'" (Tr. 685). This instruction, given as it was, merely twenty-five minutes after the jury had initially retired to begin its deliberations would thus have cured whatever confusion might have existed as to which term the court was defining in its initial charge and what the jury had to do.

The second claim which defendant makes is that, in light of the alleged misdefinition of inducement, the court's instruction that the defendant had the burden of proving inducement improperly placed upon the defendant the "burden *ab initio* to establish the entire defense of entrapment." (Br. 30.) In making this claim, counsel appears to labor under a serious misconception as to the law of entrapment in this circuit. As enunciated by Judge Learned Hand in *United States* v. *Sherman*, 200 F.2d 880, 882-83 (1952):

> "[I]n [entrapment] cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. *On the first question, the accused has the burden; on the second the prosecution has it.* (Emphasis added)

Accord, United States v. *Steinberg*, Dkt. Nos. 76-1253, 76-1258, slip op. 2191, 2198 (2d Cir. March 7, 1977); *United States* v. *Swiderski*, 539 F.2d 854, 857 (2d Cir. 1976); *United States* v. *Greenberg*, 444 F.2d 369, 371 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971). Defendant's suggestion that the District Court erred in placing upon the defendant the burden of proving inducement by a preponderance of the evidence is flatly undercut by the very opinion upon which he relies, namely *United States* v. *Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972).

In *Braver*, this Court noted that Judge Hand "did not specifically define the quantum of proof," of inducement which the defendant was required to produce in *Sherman* but after carefully analyzing his opinion, concluded that:

> "[I]t is apparent that a defendant's burden of proof must be at least the 'preponderance' or 'more-likely-than-not' standard."
>
> 450 F.2d at 802.*

While the Court in *Braver* did "suggest that it would be preferable for district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed on two different parties" and that such a charge not refer to "burden of proof" or "preponderance of the evidence" in describing the defendant's burden, 450 F.2d at 805, the Court by no means held that the use of such language in the court's charge constituted error, as appellant suggests.** Indeed, the Court upheld the charge in *Braver*.***

---

* The Court in *Braver* went on to reject (1) the claim that placing the burden of proving inducement on the defendant violated due process, and (2) the claim that there was prejudicial error because the jury must apply two different standards of proof.

** The Court thus noted that "we reject the proposition that the *Sherman* charge on entrapment is fatally defective." 450 F.2d at 804. That this is so is made clear not only by the holding in *Braver* itself, but also by this Court's recent opinion in *United States* v. *Steinberg*, Dkt. Nos. 76-1253, 76-1258, slip op. 2191, 2198 (2d Cir. March 7, 1977), where in discussing the entrapment charge in that case, this Court held:

> "Two stages of inquiry are involved. First, *the defendant must prove by a preponderance of the evidence that the crime charged was initiated or induced by a Government agent. United States* v. *Braver*, [cite omitted]. Thereupon the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense [cite omitted]."

*** The charge in *Braver* which the Court found to be proper provided in pertinent part that "The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. . . . On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt *but he must prove it by a fair preponderance of the evidence.*" 450 F.2d at 801 n.4.

Accordingly, it cannot be claimed that the District Court erred in this case in placing upon the defendant the burden of proving inducement by a preponderance of the evidence.

Defendant's reliance on *United States* v. *Swiderski*, 539 F.2d 854 (2d Cir. 1976) and *United States* v. *Pugliese*, 346 F.2d 861 (2d Cir. 1965), is totally misplaced. In *Swiderski*, the District Court had charged that in order to establish the entrapment defense, the defendant

> "must show that he had no previous disposition, intent or purpose to possess or to distribute the cocaine." 539 F.2d at 858.

The Court thus completely reversed the proper burden of proof by requiring the defendant to show his lack of predisposition rather than requiring the Government to prove the fact of predisposition beyond a reasonable doubt.

In *Pugliese*, the District Court's charge properly placed the burden upon the Government of proving the fact of predisposition beyond a reasonable doubt, but "never expressly delineated defendant's burden of proof" as to inducement, 346 F.2d at 863, thus leaving the jury to conclude that the defendant also had to prove inducement beyond a reasonable doubt, the only burden of proof mentioned in the court's charge. *See United States* v. *Gorin*, 313 F.2d 641, 654 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).*

In the instant case, no such misallocation of the burdens of proof occurred, as the court stated clearly

---

* Indeed in *United States* v. *Braver*, *supra*, 450 F.2d at 802, the Court noted that nothing said in *Pugliese* indicated that the defendant's burden of proof was anything less than a preponderance of the evidence.

on four occasions that (1) the defendant need only demonstrate the fact of Government inducement by a preponderance of the evidence, (Tr. 646, 647, 683, 684), and that having done so, (2) the Government was then required to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. (Tr. 646, 648, 683, 684).

Appellant's final claim with respect to the entrapment charge, and the only one which he has preserved by proper objection below, is that the court erred in commenting with respect to entrapment generally that "it is not simply, this defense of who spoke to whom first, but this is the legal definition of the term entrapment as I am giving it to you." (Tr. 646). This comment by the court was, however, necessitated by defense counsel's own highly misleading statement to the jury in summation that "if you have a reasonable doubt that my client initiated this crime, you must acquit him." (Tr. 593). When defense counsel again made this same suggestion at the close of his summation, (Tr. 609), despite the court's prior admonishment, the Government specifically requested prior to the court's charge that it make clear to the jury that even if they were to find that Sarmiento approached Martinez, that would not end the matter, but that they would then be required to determine whether the Government had shown Martinez to have been predisposed to commit the crime. (Tr 620-21). Thus the comments of which defendant now complains were no more than an effort by the court to rectify the erroneous statement of the law in counsel's own comments, and simply made clear to the jury that resolution of the question of who spoke to whom first did not dispose of the legal issue of entrapment. As such, it was an entirely proper instruction.

POINT II

The Disrict Court Did Not Improperly Limit the Defendant's Examination of Witnesses.

Defendant claims the court improperly restricted his examination of witnesses at trial in two respects. First, it is claimed that defendant was limited in his cross-examination of Sarmiento as to (a) her conversations with the defendant concerning her treatment at the hands of Argentinian and American authorities at the time of her extradition, and (b) her motives in cooperating with and testifying for the Government in this case. Second, it is claimed that the defendant was limited in his direct examination of a character witness. The record in this case reveals otherwise.

One of the most consistently reiterated principles of law is that the court which hears the evidence is best suited to rule on its admissibility. *Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974); *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Questions of the relevancy of proffered evidence are to be determined in the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of a clear abuse of that discretion. *Hamling v. United States, supra*, 418 U.S. at 124-25; *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

Similarly, the admission of evidence on cross-examination and the extent of its scope are matters for the trial court's discretion. *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Corr*, 543 F.2d 1042 (2d Cir. 1976); *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975),

cert. denied, 424 U.S. 911 (1976). A trial judge's determination of the proper scope of cross-examination is to be treated with "great deference" by appellate courts and reversed only upon a showing of a clear abuse of discretion. *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). This is particularly true where it appears from the record that notwithstanding the exclusion of individual items of evidence the cross-examination has nonetheless been "full and searching," *United States* v. *Kahn*, *supra*, 472 F.2d at 281; *United States* v. *Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); or where further questioning will sidetrack the trial by involving the court in collateral issues which may cause undue delay or confusion. *Hamling* v. *United States*, *supra*, 418 U.S. at 127; Rule 403, Federal Rules of Evidence.

With these fundamental principles in mind, it becomes readily apparent that in none of the specific rulings about which Martinez complains was there any impropriety or abuse of discretion on the part of the District Court.

A. Cross-Examination of Yolanda Sarmiento

Defendant's examination of Sarmiento, the inmate whom Martinez helped to escape, was particularly lengthy and searching. After her comparatively brief direct testimony (Tr. 49-78), much of which was devoted to eliciting evidence of her criminal history, her prior misconduct, and her agreement with the Government, Sarmiento was subjected to an extensive initial cross-examination designed to impeach her credibility* and to suggest that

* Among the topics explored on this cross-examination were Sarmiento's contacts with the prosecution in preparation for trial, (Tr. 95-100), her prior arrests, (Tr. 100-20), the federal indictments then outstanding against her, (Tr. 120-25), the agreement arrived at with the Government with respect to those indictments, (Tr. 128-32), and her guilty plea. (Tr. 132-42).

she entrapped Martinez. (Tr. 94-148). Following her initial testimony, Sarmiento was excused but then recalled by defense counsel twice more the following day for further cross-examination. (Tr. 172-80). Finally, a few days later, she was called as a defense witness. (Tr. 327-29).

1. Sarmiento's treatment by the authorities in Argentina and the United States

Defendant complains that the District Court did not allow him to cross-examine Sarmiento as to the details of conversations she had with the defendant about her treatment at the hands of the authorities in both Argentina and the United States. Although Martinez makes much of the trial court's initial preclusion of cross-examination in this area, the fact is that the court reversed itself and ruled:

> "If you want to go ahead and ask her first of all if she had any conversation with him with respect to her treatment in Argentina and she says no, I think that is the end of that.
>
> There is no question but you have the right to ask her what the conversation was when she talked to him. You have the right to ask her whether she had a conversation with him with respect to what went on in Argentina." (Tr. 169).

Thereafter, in response to questions by defense counsel, Sarmiento acknowledged telling Martinez of her treatment by the Argentinians, including the manner of her kidnapping by them in Argentina, (Tr. 143-44, 172), the fact that she was brutally beaten and tortured, (Tr. 173, 175-76), the fact that her son was kidnapped, held for $10,000 ransom and ultimately killed, (Tr. 173, 131), and that she feared spending the rest of her life in prison (Tr. 127). She denied, however, ever telling Mar-

tinez that she had been raped by the Argentinians or the Americans (Tr. 175), that there was a plot against her in Argentina (Tr. 144), that her son was kidnapped by the police (Tr. 173), that her husband was killed in her home by the Argentinian police (Tr. 174), that he was forced to escape from federal prison to avoid persecution by American authorities, (Tr. 175, 178-79), or that she was innocent of the charges against her. (Tr. 144).

Martinez complains, nonetheless, that the court precluded him from eliciting from Sarmiento the "gory details" of her treatment at the hands of the Argentinians as told by her to him, cutting off all questions on this subject following her statement that she told him the Argentinian police had "hit her." (Tr. 176). It must be noted, however, that the court so ruled only after Sarmiento had acknowledged having told Martinez of having been "hounded", "brutally beaten", and "tortured", by the Argentinians. (Tr. 172, 175-76).

In light of this record, it is clear that Martinez' claim that he was induced to help Sarmiento escape by her stories of her treatment at the hands of the Argentinians was fully explored both on cross-examination of Sarmiento and in his own direct testimony,* and that "the issue was fairly put to the jury," *United States* v. *Blackwood*, *supra*, 456 F.2d at 531; *United States* v. *Mahler*,

---

* Martinez later testified that despite the bruises he noticed on Sarmiento when he first met her, "she said she was all right." (Tr. 409). Martinez testified that later, she told him how she was kidnapped, how her son was also kidnapped and burned alive, and how her husband escaped from prison. (Tr. 411-15). Despite the many attempts of defense counsel through leading questions to elicit from Martinez the "gory details", the defendant was unable to describe on his own what Sarmiento purportedly told him. (Tr. 412-16).

363 F.2d 673, 677 (2d Cir. 1966). To have permitted further exploration of the "gory details" of Sarmiento's treatment would have "opened up a trial within a trial," *United States* v. *Bowe*, 360 F.2d 1, 16 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966), an eventuality which a trial court may properly choose to prevent, in the sound exercises of its discretion. Fed. R. Evid. 403.*

2. Sarmiento's statement to a psychiatrist

Defendant complains that the court improperly precluded him from cross-examining Sarmiento concerning statements made by her to a psychiatrist.

On cross-examination, the defendant first inquired of Sarmiento as follows:

> Q. Didn't you tell him [Martinez] that there was a plot against you in Argentina because of your political views?
>
> A. No. I don't understand anything at all about politics.
>
> Q. You never told anybody there was a plot against you in Argentina, did you?
>
> A. No.
>
> (Tr. 144).

Defense counsel next established that Sarmiento had been examined by a psychiatrist and then simply attempted to read the hearsay statement of the psychiatrist into evidence, stating:

---

* Rule 403 of the Federal Rules of Evidence provides that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Q. Didn't you tell him——

Mr. Gallina: The second paragraph, the third sentence. [reading from report] "She also stated she had political enemies who had her kidnapped and brought here because she is against the regime in Argentina." (Tr. 145).

The court quite properly sustained an objection to this inquiry for, as the record reveals, this prior statement by Sarmiento was not inconsistent with her testimony, and thus could not be used to impeach her as counsel sought to do, under Rule 613 of the Federal Rules of Evidence.

Before he attempted to cross-examine Sarmiento about her prior statement to the psychiatrist, defense counsel had elicited testimony that Sarmiento never told anyone there was a plot against her in Argentina. (Tr. 144). However, Sarmiento did not tell the psychiatrist that there was a plot against her in Argentina. Rather, she told him that she had been kidnapped in Argentina. The absence of any inconsistency is made clear by the fact that earlier in the cross-examination Sarmiento explicitly acknowledged telling Martinez that she had been kidnapped in Argentina (Tr. 143-44), just as she told the psychiatrist.* As such, Sarmiento's testimony at trial was clearly consistent with her statement to the psychiatrist and the court properly rejected defense counsel's efforts to impeach her in this manner.

In any event, it is clear that the defendant was in no way prejudiced by the court's ruling. The jury already

---

* Arguably, Sarmiento was privileged to refuse to answer questions about her consultations with a psychiatrist. *See United States* v. *Green*, 523 F.2d 229, 237 n. 7 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

had before it abundant evidence impeaching Sarmiento's credibility, including her prior arrests, convictions, and misconduct. In light of this substantial impeachment evidence, exclusion of the alleged inconsistent statement was hardly prejudicial.* *United States* v. *Blackwood*, *supra*.

3. Sarmiento's motive to testify favorably for the Government

Defendant also claims the court precluded him from fully exploring on cross-examination Sarmiento's motives for testifying favorably for the Government by preventing him from "show[ing] the precise nature of the charges against Sarmiento and the length of sentence she faced." (Br. 39-40). An examination of the record reveals that on the contrary the defendant was permitted to explore thoroughly both these matters, inquiring in detail as to the fact that she then had four federal narcotics indictments outstanding (Tr. 120, 122-23, 129-30), the number of counts she was facing (Tr. 123, 125, 127-28) and the fact that she was facing possible penalties of 140 years, (Tr. 123, 126) 40 years, (Tr. 127) 40 years, (Tr. 128), and 20 years imprisonment on each of the four indictments, respectively.**

---

* Defendant's reliance upon *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966) is misplaced, since the statement here was arguably collateral unlike that in *Barash* which went to bias, which is never deemed collateral. *United States* v. *Haggett*, 438 F.2d 396, 399 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971); *United States* v. *Lester*, 248 F.2d 329, 334 (2d Cir. 1957).

** Sarmiento volunteered that she was facing four indictments, (Tr. 120) that she had pleaded guilty to one of them, (Tr. 126-27, 129), and that the penalty she faced upon her plea of guilty was a minimum of five years imprisonment and a maximum of twenty years. (Tr. 123-24, 127). Although she did not know the maximum penalty she had faced in total on the four indictments (Tr. 123-26), she knew, prior to her plea, that she was facing the rest of her life in prison. (Tr. 127).

Sarmiento was also extensively questioned about the agreement which had been reached with the Government. In response to counsel's questions, she testified that shortly after her arrival in the United States, she agreed to plead guilty to one indictment, as to which she faced a minimum of five years and a maximum of twenty years imprisonment (Tr. 123-24, 127), the other three indictments being dismissed at the time of sentencing. (Tr. 129-30). When Sarmiento was unable to recall whether any other promises had been made to her (Tr. 127), defense counsel was permitted to introduce the minutes of her guilty plea on November 4, 1976 in the Eastern District of New York, in which a conditional promise had been made albeit after the instant case had developed.* (Tr. 134-42, 183-84).

Despite this exhaustive exploration of the charges pending against Sarmiento, the possible punishment she faced, the agreement she had with the Government, and

---

* This understanding, which was read to the jury from the plea minutes, provided that if between the time of her plea and sentence, Sarmiento provided additional cooperation with respect to another matter, unrelated to the escape case, the United States Attorney's Office in the Southern District of New York would recommend to the United States Attorney for the Eastern District of New York that he recommend to the sentencing judge that he not impose more than a ten-year sentence. If the prosecutors in the Eastern District of New York disagreed with that recommendation and declined to so recommend, Sarmiento would have the option of either withdrawing her guilty plea and going to trial or facing a possible sentence of five to twenty years as previously agreed. (Tr. 134-40). David DePetris, Chief of the Narcotics Unit of the United States Attorney's Office for the Eastern District of New York also testified to this additional arrangement. (Tr. 183-86, 198-99). At the time of trial, Sarmiento faced a possible sentence of five to twenty years' imprisonment upon her guilty plea, as she had testified. (Tr. 186).

thus her motive to testify favorably for the Government, defendant claims error because he was purportedly precluded from questioning David DePetris, Chief of the Narcotics Unit in the Eastern District of New York, and the person who represented the Government in its agreement with Sarmiento, as to the possible length of sentences under the charges in the indictments. An examination of the record, however, reveals this claim to be flatly wrong. DePetris was permitted to and did testify on cross-examination as to the maximum possible sentences on each count of Indictment 72 Cr. 1260, the only indictment as to which counsel inquired. (Tr. 191). In view of Sarmiento's acknowledgment of the fact that although she did not know the precise number of years she faced, she knew she faced the rest of her life in prison, (Tr. 127) this entire inquiry was somewhat irrelevant in any event.

While a defendant is always accorded great latitude in eliciting evidence as to motive, either on cross-examination or by extrinsic evidence, *United States* v. *Haggett*, 438 F.2d 396 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971); *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970); *United States* v. *Masino*, 375 F.2d 129 (2d Cir. 1968); *United States* v. *Lester*, 248 F.2d 329 (2d Cir. 1957), Judge Mansfield, writing for the Court in *United States* v. *Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972), noted that:

> A defendant's right to elicit such evidence, however, is not boundless but is subject to reasonable limitations imposed by the trial judge in the exercise of sound discretion. The test for determining whether there has been an abuse of discretion is whether "the jury was otherwise in possession of sufficient information concerning

> formative events to make a 'discriminating appraisal' of a witness' motives and bias." 456 F.2d at 530, quoting from *United States* v. *Campbell, supra*, 426 F.2d at 550.

In the instant case, it is clear that there was abundant evidence as to Sarmiento's motives both from the Government and the defendant, and that in sum, the issue was "fairly put to the jury." *United States* v. *Mahler*, 363 F.2d 673, 677 (2d Cir. 1966); *United States* v. *Benson*, 548 F.2d 42, 47 (2d Cir. 1977); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

Martinez also complains that the District Court improperly restricted his cross-examination of Sarmiento concerning the narcotics activities underlying the several indictments then outstanding against her. However, as this Court long ago observed in *United States* v. *Provoo*, 215 F.2d 531, 536 (2d Cir. 1954) *aff'd*, 350 U.S. 857 (1955):

> "In the Federal courts there has been an impressive unanimity of view on the point before us. As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes."

Accord United States v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *DeSapio*, 456 F.2d 644 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). While *Provoo* appeared to leave open a possible distinction between the latitude afforded in cross-examining a witness and a defendant, the Court subsequently made clear in *United States* v. *Bowe*, 360 F.2d 1, 14 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966), that the credibility of a Government witness could not be attacked on cross-examination by "showing acts of

misconduct not the subject of a prior criminal conviction." This rule was in turn embodied, with some modification, in Rule 608(b) of the Federal Rules of Evidence.

Martinez now attempts to justify what was little more than a concerted effort to make clear to the jury that Sarmiento was an evil person by claiming that the narcotics activities in which she engaged were probative as to her truthfulness, thus constituting a permissable subject for inquiry on cross-examination. Rule 608(b), however, contains two caveats to the provision permitting inquiry into such matters: (1) that such misconduct be "probative of truthfulness or untruthfulness," and (2) that such inquiry will be permitted "in the discretion of the court." Because Rule 608(b) was specifically amended prior to its adoption to insure that it would be restrictively interpreted by the trial courts, it is generally recognized that cross-examination should be permitted only as to those specific types of misconduct which are generally recognized to indicate a lack of truthfulness.*

In the instant case, the court in fact permitted extensive exploration of those instances of misconduct by Sarmiento which, though not the subject of a conviction, were probative as to truthfulness. Accordingly, counsel was permitted to probe in some detail Sarmiento's use of false names in travelling to and from the United States, (Tr. 102-10) her various arrests and the charges, (Tr. 100-15) and the fact that she posted bail and fled on several occasions. (Tr. 112-19).

---

* See Report to the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., No. 93-650, Nov. 15, 1973, p. 10; 3 J. Weinstein and M. Berger, Weinstein's Evidence, ¶ 608 [05] at 608-28, 29 (1976 ed.).

While there is a substantial question as to whether narcotics trafficking is probative as to truthfulness at all,* the court did permit the defendant to show that Sarmiento had sold a lot of narcotics to many customers, (Tr. 111), apart from the fact of her having been federally indicted on four occasions for narcotics activities. The court refused to permit counsel, however, to ask the witness whether she had sold a particular quantity of narcotics on a particular date, (Tr. 121-22, 147), recognizing this to be no more than an attempt to impress upon the jury the magnitude of Sarmiento's wrongdoing generally. By its rulings, the District Court clearly recognized that such details as the quantity of narcotics sold were in no way probative as to truthfulness,** and

---

* Compare this Court's statement in *United States* v. *Puco*, 453 F.2d 539, 542 (2d Cir. 1971) that "we do not believe that a narcotics conviction is particularly relevant to in-court veracity," with its more recent statement in *United States* v. *Ortiz*, Dkt. No. 76-1460, slip op. 2789, 2792 (2d Cir. April 11, 1977) that "the District Judge in his discretion was entitled to recognize that a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie. From this he could rationally conclude that such activity in a witness' past is probaitve on the issue of credibility."

It should be noted that both *Puco* and *Ortiz* concerned the use of prior convictions and not simply bad acts, used in the cross-examination of a defendant.

** The court did in fact indicate its apparent willingness to allow Martinez to explore the transactions in the indictment to which Sarmiento pleaded guilty, but defendant declined to do so, inquiring instead only as to other indictments. (Tr. 121-22). Even with respect to the transactions to which she did plead guilty, this Court recently sustained the refusal of the trial court to permit inquiry into the details thereof after defense counsel had elicited "the crime, the court, the sentence and the date of conviction". *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied, sub nom. Scardino* v. *United States*, 425 U.S. 960 (1976). As the Court there observed:

[Footnote continued on following page]

its decision accordingly was well within the limits of its discretion under Rule 608(b).

Martinez also attempts to circumvent the limitations of Rule 608(b) by claiming that such misconduct is probative as to bias and motive. While there is no question but that evidence of misconduct which is probative as to bias or motive is never deemed collateral, *United States* v. *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970); *United States* v. *Lester*, 248 F.2d 329, 344 (2d Cir. 1957), and hence is not subject to the restrictions of Rule 608(b), the claim which Martinez asserts in this case is particularly far-fetched, namely that "since this previous misconduct, had it occurred, could be taken into account by Sarmiento's sentencing judge, it was relevant in evaluating the extent of the sentence she might receive and her motive to cooperate." * (Br. 41). Even assuming that motive could be shown in this tenuous way, Martinez could only make this point if he first established that Sarmiento understood that the sentencing court could consider the conduct outlined in the indictments and that she was aware of the contents of those various indictments, a fact which Sarmiento denied on several occassions. (Tr. 120-32). No such foundation was ever established as

---

"While there is authority permitting examination into the "nature" of the crime, [cites omitted] the scholarly treatises on which those cases rest indicate that by "nature" is meant only the generic type of criminal behavior and not its particular details." 526 F.2d at 529.

See *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973).

* The logic of this reasoning would permit cross-examination as to any prior misconduct no matter how insignificant or distant in time it might be, since it could be considered by the sentencing judge.

counsel simply asked whether the witness had sold a particular quantity of narcotics on a particular date.*

In view of the substantial evidence of Sarmiento's criminal misconduct and her motive for testifying favorably for the Government, it is clear that the trial court did not abuse its discretion in precluding defense counsel from inquiring into the details of Sarmiento's prior narcotics transactions.** *United States* v. *Pacelli*, 521 F.2d 135, 137-40 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

---

* Martinez suggests that the Government was treated more favorably than he in that he was subject to "unrestricted and extensive cross-examination . . . on the circumstances underlying his criminal acts, whether or not they resulted in conviction." (Br. 42, 15). He fails to note, however, that (1) his prior misconduct, arrests and convictions and the details underlying them were elicited by his own attorney on direct examination, prior to any cross-examination, (Tr. 390-95); (2) at no point did defendant object to the cross-examination of which he now complains, (Tr. 443-59); (3) and more fundamentally, the Government did not seek by such inquiry simply to impeach Martinez' credibility but rather to show that (a) he claimed to have been entrapped previously when arrested for selling narcotics, and (b) he was a knowledgeable narcotics dealer and thus had a motive other than simple kindness in helping Sarmiento to escape, namely the possibility of future narcotics transactions with her

** Defendant also attempted to circumvent the limitations of Rule 608(b) and to put before the jury some of the details of Sarmiento's prior narcotics activities by introducing copies of the actual indictments against her. (Tr. 201). The court having properly refused to permit their introduction, defendant now claims he was thus precluded from exploring the nature of the charges against her, the number of counts she faced, and the maximum sentences she might have received. (Br. 40). Aside from the obvious irrelevance of the indictments themselves to the question of the maximum penalties she faced, the court had already permitted defendant to inquire of both Sarmiento and DePetris as to the nature of the charges, the number of counts, and the penalties she faced. (Tr. 120-30, 186-203).

B. Direct Examination of Defendant's Character Witness

Defendant claims that the District Court unduly restricted the direct examination of Albert Carlson by failing to permit him to state his own opinion as to the defendant's truthfulness and veracity. This claim is, however, founded upon a complete misreading of the record which reveals that the court explicitly permitted the precise inquiry of which counsel now complains.

When counsel first inquired as to the defendant's reputation for truthfulness and veracity, Carlson * testified as follows:

> Q. Did you have occasion, Mr. Carlson, to become familiar with Mr. Martinez' reputation for truthfulness and veracity? A. I can't say that I ever discussed his reputation with anybody. I made judgements.
>
> The Court: The question is, you never heard from anybody else about his reputation for truthfulness and veracity? A. In a general term, he was a nice guy.
>
> The Court: You never heard anything about his reputation for truth and veracity?
>
> A. It was never discussed. (Tr. 306-07).

Mr Carlson was recalled to the stand the following day and after testifying further about his contact with the defendant was asked the following:

---

* Carlson, who worked for the Social Service Department of the City of New York, testified that he met the defendant in July of 1976 when Martinez contacted him inquiring about the availability of social services to the families of inmates. Thereafter, Martinez helped conduct a survey within the MCC as to the need for such services. (Tr. 551-55).

Q. Did you have occasion to hear expressed or come across the reputation Mr. Martinez might have enjoyed for truthfulness and veracity? In other words, how good his word was? A. I can only speak . . .

The Court: That is your own opinion now.

A. I can only speak for myself and I found him . . .

The Court: I just told you you can't form your own opinion. It has to be the opinion of others.

A. The staff I dealt with at MCC treated Mr. Martinez as a reliable and an equal.

(Tr. 555-56)

It is of course true that pursuant to Rule 405(a) of the Federal Rules of Evidence, evidence of a trait of character, if admissable, may be proved either by testimony as to reputation or in the form of an opinion. That the District Court's action in this instance was not intended to indicate otherwise is made abundantly clear by its explicit ruling earlier that this very witness could testify as to his opinion of the defendant's truthfulness and veracity. As the court stated prior to Mr. Carlson's being recalled, "Mr. Carlson . . . can testify as to his opinion as to truth and veracity and the character." (Tr. 432).

Far from precluding the defendant from inquiring as to the witness's personal opinion of Martinez' truth and veracity, the court was merely directing the witness to respond to the question put to him by defense counsel, namely, whether he had "heard expressed or come across *the reputation* Mr. Martinez might have enjoyed for truthfulness and veracity." At no time was the witness ever asked to give his personal opinion as to the defendant's truthfulness and veracity. As in

United States v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975), the fact that the court, in essence, sustained an objection to certain of the responses to defense counsel's questions did not preclude further development of the facts with proper questions. Counsel here, as there, "did not choose to rephrase the question and abandoned the line of questioning." 507 F.2d at 22. His choise does not render the court's action erroneous.

Apart from the propriety of the District Court's ruling, the exclusion of Carlson's character evidence was of no consequence to Martinez since he had already elicited evidence of his good reputation for truth and veracity from three other witnesses, Edna David (Tr. 296-97), Paul Lannigan (Tr. 301-2), and John Dockendorff (Tr. 549).* When Lannigan was recalled to the stand following Carlson, he was again permitted to testify to the defendant's good reputation for truth and veracity. (Tr. 563-65).

Accordingly, even assuming the excluded testimony would not have been cumulative, *United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Kahan*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974); *United States* v. *Jacobs*, 451 F.2d 530 (5th Cir. 1974), *cert. denied*, 405 U.S. 955 (1972), it is clear that defendant was not prejudiced by the court's actions, which in any event, did not constitute an abuse of its discretion. *Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974); *United States* v. *Morgan*, Dkt. No. 76-1497, slip op. 2997, 3002 (2d Cir. April 18, 1977); *United States* v. *Dibrizzi*, 393 F.2d 642, 645 (2d Cir. 1968).*

---

* Defense counsel failed to ask any of these witnesses, all of whom testified *prior* to Carlson, to give their personal opinion as to the defendant's truth and veracity, inquiring only as to his reputation.

POINT III

This Case Should Not Be Remanded To The District Court For An Evidentiary Hearing.

Defendant asks this Court to remand this case to the District Court for an evidentiary hearing on the basis of an unsworn statement by Sarmiento's attorney, which is not part of the record on appeal, to determine whether, contrary to the evidence at trial, the conditional promise of the United States Attorney's Office for the Southern District of New York to recommend a ten-year sentence for Sarmiento was dependent in part upon her cooperation in the instant case.

As previously noted, Martinez sought to establish at trial that Sarmiento entrapped him in order to help herself in her own case. In cross-examining Sarmiento, defense counsel attempted to elicit the detailed terms of her agreements with the Government but was met with her inability to articulate anything beyond her fundamental understanding that she had pleaded guilty to a particular indictment, that she would be sentenced to a minimum of five and a maximum of twenty years, and that three other indictments pending against her would be dismissed. (Tr. 120-130). After establishing the terms of this initial agreement with the Government, including Sarmiento's statement that she cooperated with

---

* Martinez himself also sought to testify to statements made to him by other inmates concerning their treatment by Argentinian authorities (Tr. 412), and claims their exclusion was error since they were not being offered for the truth but to show that he believed them and was thus more likely to believe Sarmiento. Aside from the fact that whether Martinez believed Sarmiento was not in issue at trial, the court acted well within the limits of its discretion under Rule 403 in barring defendant from introducing what would otherwise have been rank hearsay, given the miniscole probativeness of the evidence and the very real danger of sidetracking the jury by opening up "a trial within a trial", *United States* v. *Bowe*, *supra*, 360 F.2d at 16, on the question of the conduct of the Argentinian authorities.

the Government because she thought it would help her case, (Tr. 131), defense counsel cross-examined Sarmiento by reading the transcript of her guilty plea in which the Government stated the terms of a subsequent conditional agreement. That second agreement, as phrased in the plea minutes which defense counsel read before the jury, provided that if "there is additional cooperation provided by Yolanda Sarmiento up, over and above what has occurred to the present time", the United States Attorney's Office for the Southern District of New York would recommend to the United States Attorney's Office in the Eastern District of New York that it recommend to the sentencing judge that Sarmiento not be sentenced to more than ten years' imprisonment. (Tr. 133-35).

The reading of the plea minutes created an ambiguity as to the terms of this conditional agreement, since the condition precedent to a favorable recommendation from the Southern District of New York was merely phrased as "additional cooperation." To clarify the issue, the Government called David DePetris, an Assistant United States Attorney from the Eastern District of New York, who explained that Sarmiento's cooperation in the escape case was not the "additional cooperation" which was contemplated in the conditional agreement and that, in fact, this additional agreement was entered into *after* the instant case had developed. (Tr. 183-86).*

Even though DePetris' unrebutted testimony should have undermined defense counsel's ability to use the conditional agreement as evidence of Sarmiento's motive to entrap Martinez, in fact, counsel simply returned to DePetris' more ambiguous statement in the plea minutes and used it in summation to argue that Sarmiento's

---

* Defense counsel did not attempt to dispute this testimony by DePetris. Indeed, in an inital discussion of the method of establishing Sarmiento's understanding of her deal with the Government, the court specifically invited defense counsel to call Sarmiento's attorney, Howard Jacobs, to testify on the issue. (Tr. 88). Defense counsel said that he did not want to call him.

cooperation in this case would indeed trigger the terms of that agreement:

> Do you remember when I asked her this after she denied she knew nothing about these things or anything about any promise being made to her and I said to her, Mr. DePetris—this is DePetris speaking in front of her in the Eastern District, and outlined to her the promise.
>
> "There was a discussion between myself and William Tendy who was the executive Assistant United States Attorney in the Southern District of New York in our office and the Southern District of New York. With respect to that there is an understanding between the Southern District of New York and the Eastern District of New York that if in between the time of the plea"—*remember the plea is this day, the 4th of November*—"between the time of the plea and the time of the sentence"—*and remember she testified she hadn't been sentenced yet, so she has to be sentenced some time after this case, so just prior to this case and some time after this case*—"there is additional cooperation provided by Yolanda Sarmiento over and above what has occurred to the present time, and it is the opinion of the Southern District of New York"—*meaning Mr. Tendy, obviously*—"that the cooperation is of such a substantial nature that if they make a determination, if they recommend to the United States office for the Eastern District and that said cooperation has been extremely substantial and recommended to us, we request the Court not to impose a sentence greater than ten years, and we agree with the nature and extent of Yolanda Sarmiento's additional cooperation and agree that said cooperation is substantial and in the interest of justice, the interest of justice will be served and we recommend to the Court that a maximum of ten years not to exceed a ten year

sentence be imposed, be the maximum the Court could impose."

* * * * *

She has to perform, this girl has to perform, you bet she has to perform.

* * * * *

She is told very clearly on the 4th of November, you perform, lady, you perform, or you don't get that five years.

If that isn't sick, I don't know what is sick, and you don't think those discussions started that day? They started, as it was admitted, in May when she was first brought to the United States. She became an informant right after she came to the United States. Those promises to become an informant were made in May, not November 4. This is only a written document evidencing it. (Tr. 600-04). (Emphasis added.)

Thus, defense counsel argued extensively and dramatically that Sarmiento's cooperation in this case was geared toward obtaining the benefits of the conditional agreement.

The Government responded to these arguments in its rebuttal summation by referring back to DePetris' testimony. However, defense counsel objected and announced: "That is not the testimony." (Tr. 615). The Court's response to defense counsel's objections was to say that the jury's recollection governed. (Tr. 615, 616).

Martinez now argues that there is some doubt as to the terms of Sarmiento's conditional agreement since her attorney, Howard Jacobs, stated at her sentencing in the Eastern District of New York, that the recommendation for the ten year maximum depended on her cooperation in the escape case and some additional matter.* This material was never presented to the District Court and Martinez attempts to take advantage of that fact to suggest that this Court should immediately remand for a hearing on the issue.

The inappropriateness of this suggestion can best be assessed by considering the usual procedure for presenting such an issue to a District Court. Ordinarily, the proper course of action would be to file a motion for a new trial based on newly discovered evidence, pursuant to Rule 33, Fed. R. Crim. P. The mere making of such a motion, however, would not necessarily entitle Martinez to a hearing as the District Court could properly require the submission of sworn affidavits before ordering a hearing or could well determine that the new evidence could not have produced a different verdict. See *United States* v. *Agurs*, 427 U.S. 97 (1976); *United States* v. *Magnano*, 543 F.2d 431 (2d Cir. 1976); *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975). The point is that it is the District Court which in the first instance should determine whether an evidentiary hearing of the type Martinez suggest, is required at all.

Martinez relies on *De Marco* v. *United States*, 415 U.S. 449 (1974) to contend that there should be a remand for a hearing. However, *De Marco* presented a far more clear cut situation, in which a Government witness had testified at trial that there were no promises made to him by the Government, but at his subsequent sentencing statements by the prosecutor himself revealed that prom-

---

* Martinez attempts to lend credence to Jacobs' statement by arguing that DePetris was present at the sentencing and acquiesced in Jacobs' statement. However, the record reflects DePetris' understanding that Sarmiento's cooperation in the escape case was *not* a condition for the sentencing recommendation. This is seen in DePetris' explanation to the sentencing court that the conditional agreement had not became operative:

> ". . . since there were certain conditions that were related to the Court in connection with the plea at the time of the plea, I thought I should indicate that those conditions had not been met." (App. Sentencing Minutes at 10).

Having just related at length the fact that Sarmiento had provided substantial cooperation in connection with the escape case both prior to and at trial, (App. Sentencing Minutes at 8), it is clear that when DePetris stated that the conditions of the additional agreement "had not been met," he could not have been understood to have agreed that her cooperation in the escape case was one of these conditions.

ises may well have been made to him before his testimony. Aside from the Supreme Court's obvious concern about the possibility of serious Governmental misconduct, there is no suggestion in *DeMarco* that had the Court of Appeals refused to decide the evidentiary question raised, but required the defendant to pursue his remedies in the District Court in the first instance, it would have been in error. Rather, the opinion in *De Marco* criticized the Court of Appeals' decision to itself resolve the issue against the defendant on the papers before it.

Appellate counsel should not be allowed to bypass the usual procedures for obtaining a hearing merely because of the fortuitous circumstance that an appeal was filed around the time that he obtained what would usually be called newly discovered evidence.* The proper course would be to affirm Martinez' conviction without passing on this issue, leaving him free to present a motion under Rule 33 for a new trial. Such matters should be considered in the District Court in the first instance and the mere raising of such speculative and insufficiently supported arguments in this Court on direct appeal should not prevent affirmance of the conviction.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

JERRY L. SIEGEL,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

---

* Indeed, had Martinez not sought to bypass these procedures, he could have moved for a new trial under Rule 33 while this appeal was pending. The merits of that motion could have been fully considered, the only limitation being that the District Court is unable to grant such a motion until the case is remanded to the District Court.

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JERRY LAWRENCE SIEGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of May, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
Federal Defender Services Unit
509 United States Courthouse
Foley Square,
New York, New York 10007
Attn: David J. Gottlieb, Esq.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

JERRY J. SIEGEL

Sworn to before me this

9th day of May, 1977

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx C
Commission Expires March 30, 1979

★ U. S. Government Printing Office 1977— 714-017-594